



# Indiana Department of Education

## SUPPORTING STUDENT SUCCESS

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### QUARTERLY REPORT

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The Quarterly Report provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have this sent electronically or wishes to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail through [legal@doe.in.gov](mailto:legal@doe.in.gov).

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## **STUDENT INFORMANTS: RELIABILITY, VERACITY, AND BASIS OF KNOWLEDGE**

The U.S. Supreme Court has not addressed the student informant within the context of pupil discipline in a public school setting, although the Second, Sixth, Seventh, Ninth, and Eleventh Circuit Courts of Appeal have done so, relying in significant part on Supreme Court decisions involving informants in criminal and law enforcement matters. There are a number of commonalities between the police informer and the student informant that can affect the reliability of the information related, such as the motivation of the informant; the identify of the informant; the method of providing the information (face-to-face versus anonymous); the informant's history of providing reliable information; the basis of knowledge for the information (directly or through hearsay); the reputation of the targeted individual, including relevant disciplinary history of the student suspect; past admissions of wrong-doing by the suspect; the ability to corroborate the information supplied, especially where the information may include details easily obtainable by the general public; and the intimate familiarity of the informant with the suspect's actions so as to predict likely future behavior.

Notwithstanding the commonalities, there are also important differences. School officials are not law enforcement personnel. As such, the standard of reasonable suspicion to justify a search of a student will be analyzed under *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733 (1985), which does not apply the "probable cause" standard applicable to law enforcement. *T.L.O.* is discussed in more detail *infra*. Further, student informants—especially those who provide information face-to-face—are considered to be more reliable than police informants. Police informants are typically associated with unsavory people and activities. Student informants are not. In addition, student informants are aware that they could face disciplinary action should their information prove misleading or untrustworthy. Student informants often lack the same incentive that drives police informants.

As will be seen, the more invasive the search conducted by school officials, the greater the reliability of the student-provided information. This is particularly true where a "strip search" of a student suspect is contemplated.

### **School Search and Seizure: The Anonymous Source**

*T.S. v. State of Indiana*, 863 N.E.2d 362 (Ind. App. 2007) involved a student at Broad Ripple High School within the Indianapolis Public Schools. In October of 2005, a school police officer received an anonymous telephone call stating that T.S. had marijuana in his right front pants pocket. The school police officer went to T.S.'s gym class and asked T.S. to accompany him to the locker room. The school police officer asked T.S. if he had anything he shouldn't have. T.S. produced a small plastic baggie from his front pants pocket. The baggie contained marijuana. T.S.'s version of what occurred differs. According to T.S., the school police officer accompanied him to the locker room and when T.S. opened his locker, the school police officer grabbed T.S.'s pants and took out two baggies of marijuana. The juvenile court denied T.S.'s motion to suppress the evidence and found that T.S. committed an act that if committed by an adult would be possession of marijuana, a Class A misdemeanor. T.S. appealed, asserting the

trial court erred by denying his motion to suppress the evidence. T.S. argued the evidence was seized in contravention of his Fourth Amendment rights under the U.S. Constitution and his rights under Article I, Section 11 of the Indiana Constitution. The Court of Appeals disagreed with T.S. and affirmed the trial court's judgment.

The Court of Appeals applied *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733 (1985), where the U.S. Supreme Court found that the Fourth Amendment does not apply strictly to school searches and seizures. As the Supreme Court noted:

The accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require a strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

*T.L.O.*, 469 U.S. at 341. The Supreme Court developed a two-prong test for determining the reasonableness of a school search: (1) whether the action was justified at its inception; and (2) whether the search was reasonably related in scope to the circumstances that justified the search in the first place. 863 N.E.2d at 367, citing *T.L.O.*, 469 U.S. at 341.

The first prong is satisfied where there are "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* The second prong is satisfied where "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.*

*T.L.O.*, however, did not address all circumstances related to a school-based search. In this case, three questions are raised: (1) what is the level of "cause" required for a school police officer who initiates an encounter with a student without the involvement of other school officials; (2) whether the encounter between the school police officer and T.S. constituted a seizure; and (3) what is the standard for determining the constitutionality of a seizure occurring in a school. *Id.*

As noted, *T.L.O.* did not address a search by a police officer on school property or, as in this case, a search conducted by a police officer employed by the school system. The Indiana Supreme Court noted in *Myers v. State of Indiana*, 839 N.E.2d 1154, 1160 (Ind. 2005), *cert. den.*, 547 U.S. 1148, 126 S. Ct. 2295 (2006), that there are three categories for school searches that are generally applied:

1. Where school officials initiate the search or police involvement is minimal, the reasonableness standard is applied;
2. Where the search is conducted by the school resource officer on his or her own initiative to further educationally related goals, the reasonableness standard is applied; and
3. Where "outside" police officer initiate the search of a student for investigative purposes, the probable cause and warrant requirements are applied.

*Id.* at 367-68. The appellate court, after deciding that the Indiana Supreme Court had adopted these three categories for analyzing such situations, decided that the school police officer fell into the second category (“school resource officer” acting on his own initiative to further educationally related goals), which would require an application of the *T.L.O.* reasonableness standard rather than the Fourth Amendment’s probable cause requirement.

At the time of the incident, the school police officer was employed by the school system. He received the anonymous tip while at the high school and while performing his functions. The Indiana Court of Appeals in an earlier case had determined that a security officer employed by a school system will be governed by *T.L.O.*’s reasonableness standard. See *S.A. v. State of Indiana*, 654 N.E.2d 791, 795 (Ind. App. 1995), *trans. den.* (search of school locker and book bag). *Id.* at 369.<sup>1</sup> Decisions from other jurisdictions also indicate that where a law enforcement officer is acting as a school employee, *T.L.O.* will apply and not the probable cause standard typically applied to law enforcement. The “ferreting out [of] drugs” is considered “the furtherance of educational goals.” *Id.* at 370 (collecting cases). The purpose of the school police officer is also relevant. In this case, the school police officer was concerned with T.S.’s actions as violating school rules and was not treating the matter as violations of the laws of the State of Indiana. *Id.* at 370-71 (collecting cases). The school police officer in this case was not only ferreting out criminal activity but also preserving an environment conducive to education. “[T]he presence of drugs on school property presents a serious threat to a learning environment.” *Id.* at 371. The appellate court added:

We do not hold that any action by a school police officer is governed by *T.L.O.*’s reasonableness test. As our supreme court has indicated, this standard applies to school resource officers acting on their own initiative, and acting “to further educationally related goals.” *Myers*, 839 N.E.2d at 1160. On the facts of this case, [the school police officer] was acting to further such goals, and we therefore will analyze his actions under the principles of *T.L.O.*

*Id.* The Court of Appeals determined that the school police officer’s act of requiring T.S. to leave his gym class and accompany him to the locker room constituted a “seizure” for Fourth Amendment purposes. *Id.* at 372-73. *T.L.O.*’s reasonableness standard, however, would apply to a “seizure” as well as a “search” under these circumstances. *Id.* at 373-75 (citations omitted). The analysis, then, would look to see whether the “seizure” of T.S. was justified at its inception and whether the scope and nature of the seizure was reasonable. *Id.* at 375.

A school police officer’s seizure of a student to be reasonable does not have to meet the “articulable suspicion” necessary to justify a stop of a citizen in public. *Id.* First, there need not be as high a level of suspicion to conduct an investigatory stop as there is to conduct a full-fledged

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<sup>1</sup>At the time of this incident, statute did not specifically provide for school police officers. I.C. § 20-26-16 *et seq.*, effective July 1, 2007, specifically authorizes school boards to establish “a school corporation police department.” There is also a grandfather provision that recognizes school corporation police departments that existed prior to July 1, 2007. See I.C. § 20-26-16-7.

search. Based on *T.L.O.*, a lower standard of “reasonable suspicion” will be applied for an investigatory stop in a public school. Second, students enjoy a lesser expectation of privacy in a public school than they do in public. “Because an investigatory stop in public may be justified upon reasonable suspicion, it follows that a lower standard should be required in the public school setting.” *Id.*

In this case, T.S. was not free to walk away from the school police officer when the school police officer asked him whether he had any contraband. It is also not disputed that the school police officer’s only reason for seizing T.S. was an anonymous tip, which raises the question as to whether the school police officer acted reasonably.

Our supreme court has indicated that in the context of investigatory stops conducted by police officers, an anonymous tip will constitute “reasonable suspicion” only when two conditions are met. First, the State must corroborate significant aspects of the tip. Under this prong, “corroboration requires that an anonymous tip give the police something more than details regarding facts easily obtainable by the general public to verify its credibility. *Sellmer v. State of Indiana*, 842 N.E.2d 358, 361 (Ind. 2006). Second, the tip “must also demonstrate an intimate familiarity with the suspect’s affairs and be able to predict future behavior. *Id.* The rationale of requiring some sort of confirmation is that before interrupting a person’s liberty, an officer should have some indication that the tipster is a reliable, good-faith informant, and not a prankster acting in bad faith. See *Washington v. State of Indiana*, 740 N.E.2d 1241, 1246 (Ind. App. 2000), *trans. denied*.

*Id.* at 376. The State in this case argued that the school police officer corroborated significant aspects of the anonymous tip but confirming T.S. was a student at the high school and by finding marijuana at the location specified by the tipster. *Id.* The Court of Appeals rejected this argument, noting that “to allow the product of a search or seizure to serve as corroboration of an anonymous tip would be to ignore the fundamental principle that the results of a search or seizure do not justify the initial illegality.” *Id.* at 377.

The anonymous tip in this case clearly did not give [the school police officer] reasonable suspicion required to conduct a ...stop outside a school. Indeed, [the school police officer] corroborated no significant aspect of the tip, and the tip itself demonstrated no familiarity with T.S., other than that he did indeed attend BRHS, a fact that could be readily determined by anyone wishing to harass T.S. Indeed, this tip contains the barest indicia of reliability of which we can conceive. Thus, we recognize that all the harms present with anonymous tips are relevant to our analysis of whether [the school police officer] acted reasonably.

*Id.* Neither the Supreme Court of Indiana nor the United States Supreme Court has addressed whether an anonymous tip can justify a search initiated by a school official on school property. *Id.*

After considering the reduced expectation of privacy that students enjoy in public schools, we hold that [the school police officer] acted reasonably in investigating the tip. Removing T.S. from class, although certainly an intrusion on his privacy, was not an invasive intrusion. Indeed, school officials routinely remove students from class for a variety of reasons. Although, as T.S. points out, it may cause more embarrassment for a student to be removed by a police officer, the officers to which this holding applies are also people whom students routinely see in the hallways, and are in the schools not only to enforce laws, but also to maintain a safe environment conducive to learning. As discussed above, the presence of drugs in schools is a serious problem that jeopardizes the learning environment. We think it reasonable that an officer charged with maintaining this environment investigate a tip indicating that a student has drugs on school property by removing the student from class for questioning with the intent of taking the student to the dean's office. Therefore, the seizure of T.S. did not violate his Fourth Amendment rights.

*Id.* at 377-78. The school police officer's actions, when considered in their totality, did not offend Indiana's Search and Seizure provision at Art. I, Sec. 11 of the Indiana Constitution. The seizure of T.S. was reasonable under both the U.S. and the Indiana constitutions. *Id.* at 378-79.

In ***C.B. v. Discoll et al.***, 82 F.3d 383 (11<sup>th</sup> Cir. 1996), the assistant principal was told by a student that C.B. was going to make a drug sale at the high school later that day. The student informant received this information from another student. The drugs were reportedly hidden in C.B.'s "big old coat." The principal and assistant principal retrieved C.B. from class and informed him that they had learned he possessed drugs. He was wearing a coat. He was asked to empty the pockets. C.B. removed from his coat pockets two packets of what appeared to be marijuana. (Later, it was determined that the contents were "look-alikes" of illegal substances.) The student was aware that school rules not only prohibited illegal drugs but "look-alikes" as well.

C.B. later challenged the search, claiming that the administrators had not observed him with drugs, had not observed him acting strangely, and the student informant was unreliable. The 11<sup>th</sup> Circuit found that the search did not violate the Fourth Amendment. *Id.* at 388. "The tip in this case provided sufficient probability, viewed against the 'reasonable grounds' standard, to justify the search here." *Id.*

In so holding, the court noted that the informant was a fellow student. The tip was provided directly to an administrator rather than anonymously, which rendered the tip more reliable because the informant would face disciplinary repercussions if the information supplied proved misleading. The court also stated that "tips from students are less suspect than those from society in general." *Id.* In addition, the administrators did receive at least some corroboration when they observed C.B. wearing a coat as described by the informant. *Id.* "In light of the circumstances, reasonable ground to search existed; and C.B.'s Fourth Amendment rights were not violated." *Id.*

***In the Interest of S.C. v. Mississippi***, 583 So.2d 188 (Miss. 1991) involved a locker search. S.C. offered to sell two handguns to a student. The student reported this incident to the assistant

principal, who asked the student informant to inquire of S.C. whether the handguns were on campus. S.C. told the student they were. The informant dutifully reported this information to the assistant principal. The assistant principal and another administrator sought to search S.C.'s locker, but it was secure. They retrieved S.C. from class and had him open his locker. One of the administrators found the handguns in a black bag inside the locker. He was later adjudicated a delinquent.

S.C. later challenged his adjudication, arguing in part that the school officials had no authority to search his locker without a search warrant, and that they lacked probable cause to obtain such a warrant. The Mississippi Supreme Court noted that *T.L.O.* does not require school officials to have probable cause or to obtain a search warrant. Even though *T.L.O.* did not address any criteria for judging the searches of "lockers, desks, or other school property provided for the storage of school supplies," *T.L.O.*, 469 U.S. at 337, *n.* 5, the Mississippi court nevertheless thought "it fair to say that this case falls within the principle *T.L.O.* announces. The search of S.C.'s locker was reasonable under the circumstances and offends no federal standard." 583 So.2d at 190-91.

The Mississippi Supreme Court found that the report from the student informant "gave the school officials reasonable grounds to search S.C.'s locker." *Id.* at 191. Although the student informant had not actually seen the two handguns and he was the sole source of information upon which school officials relied, the circumstances indicate the student informant had reliable information. The student reported to the assistant principal that S.C. had offered to sell him two handguns. The assistant principal asked the informant to verify the guns were at school, which he did. "A responsible school official under the circumstances would and should have regarded this information sufficient that he take action. The school officials had reasonable grounds to search S.C.'s locker without a warrant[.]" *Id.* at 192.

In the larger world we expend considerable judicial energy searching out the reliability of informants and the basis of their knowledge. We do this because experience has taught that informants often act out of self interest and, more generally, they are not among our more reliable citizens.... High school students would seem to fall into a different and generally less suspect class. Absent information that a particular student informant may be untrustworthy, school officials may ordinarily accept at face value the information they supply.

*Id.*

### **The Invasiveness of the Search**

*T.S.* and *S.C.* involved locker searches. *C.B.* involved the search of a coat. These searches would not be considered terribly invasive. While *T.L.O.* applied to these in-school searches, had school personnel conducted a more invasive search, they might have run afoul of the Fourth Amendment. As the Supreme Court noted in *T.L.O.*: "[S]uch a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U.S. at

342. So-called “strip searches” of students based on tips from informants will require considerably more corroboration and other indicia of reliability before the “strip search” would be considered “reasonable” under the *T.L.O.* standard.

Not all tips from informants are equal in their reliability. See ***Redding v. Safford Unified School District #1***, 531 F.3d 1071 (9<sup>th</sup> Cir. 2008), an *en banc* decision addressing the strip search of a middle-school girl, discussed more fully under “Strip Searches” in **Updates**, *infra*. In *Redding*, the court found that the school’s reliance upon statements from a student informant in order to strip-search another student was misplaced and resulted in an unconstitutional search. The student informant possessed the contraband. There was no physical evidence that linked Redding to the contraband. The school’s justification for the strip-search of Redding was the informant’s “self-serving statement, which shifted the culpability for bringing the pills to school from [the informant] to [Redding], [which] does not justify a highly invasive strip search of a student who bore no other connection to the pills in question. We do not treat all informants’ tips as equal in their reliability.” 531 F.3d at 1082.

Whether an informant’s tip is sufficient to support the sort of reasonable suspicion necessary for school officials to conduct such an invasive search of a student, the informant’s veracity, reliability, and basis of knowledge must be considered. *Id.* (citation omitted).

For good reason, we are most suspicious of those self-exculpatory tips that might unload potential punishment on a third party.... Our concerns are heightened when the informant is a frightened eighth grader caught red-handed by a principal. This is particularly so when the student implicates another who has not previously been tied to the contraband and, more generally, has no disciplinary history whatsoever at the school. More succinctly, the self-serving statement of a cornered teenager facing significant punishment does not meet the heavy burden necessary to justify a search accurately described by the Seventh Circuit as “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant [and] embarrassing.” *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7<sup>th</sup> Cir. 1983).

*Id.* at 1082-83. The student informant did not have a history of reliability. Her “tip” provided no information that Redding was currently in possession of contraband or that Redding secreted such contraband on her person such that a strip search would reveal the contraband. There was no independent corroboration for the “tip.” “At a minimum, [the school officials] should have conducted additional investigation to corroborate [the informant’s] ‘tip’ before directing [Redding] into the nurse’s office for disrobing.” *Id.* at 1083.

The school officials should have been more circumspect regarding the veracity and reliability of the informant’s “tip.” “[The informant’s] compounding number of school rule violations should reasonably have cast more suspicion on her own culpability, further undermining the reliability of her accusation of [Redding].” *Id.* at 1084.

The 9<sup>th</sup> Circuit contrasted the strip search of Redding with the search in ***Cornfield by Lewis v. Consolidated High School District No. 230***, 991 F.2d 1316 (7<sup>th</sup> Cir. 1993). In *Cornfield*, the 7<sup>th</sup>



Circuit found a strip search of a 16-year-old student was justified at its inception, even though the search did not uncover contraband. The “reasonable suspicion” upon which the school officials relied resulted from information from a number of sources considered reliable. The student had a history of “crotching” drugs. A teacher’s aide observed that Cornfield appeared “too well endowed,” suggesting that he was “crotching” drugs. A student reported Cornfield brought drugs on campus. Local law enforcement warned school officials that Cornfield may be selling marijuana to other students. A teacher reported that Cornfield admitted he had previously dealt drugs and had “crotched” drugs during a police raid at his home. *Cornfield*, 991 F.2d at 1319, 1322.

These factors—teacher observations indicating the contraband was hidden in Cornfield’s underwear, tips from impartial students, police reports, and previous student admissions—all distinguish Cornfield’s search from that of [Redding], whose only tie to the [contraband] in question was [the student informant’s] statements which, in this context, were unreliable.

*Redding*, 531 F.3d at 1084.

The 9<sup>th</sup> Circuit noted that decisional law in the area of student informants is “sparse,” adding that “other circuits have held that students who provide information implicating other students in illegal or otherwise prohibited activities are tantamount to ‘informants,’ and have used case law from the criminal context to determine the circumstances under which such students’ ‘tips’ could give rise to reasonable suspicion sufficient to justify a search.” *Redding v. Safford*, 504 F.3d 828, 832-33 (9<sup>th</sup> Cir. 2007), the original three-member panel decision reviewed later by the 9<sup>th</sup> Circuit *en banc*.<sup>2</sup>

Besides the *Cornfield* decision from the 7<sup>th</sup> Circuit, the 9<sup>th</sup> Circuit also relied upon decisions from the Second and Sixth Circuit Courts of Appeal. *Williams v. Ellington et al.*, 936 F.2d 881 (6<sup>th</sup> Cir. 1991) involved a high school girl who was suspected of possession of drugs on the school campus. This dispute began when a mother telephoned the high school principal to inform him that her daughter had been offered drugs by another student. In a subsequent interview of the student, she reported that during typing class the day before, Williams and another girl had a clear glass vial containing a white powder that they placed on the tips of their fingers and sniffed. One of the girls offered it to the student, but she declined. The principal asked whether the student had any problems with these two girls and was informed that there was no animosity between them. The principal was satisfied the student had no ulterior motive for reporting the incident. 936 F.2d at 882.

The principal discussed the matter with the typing teacher and with one of the named students. The teacher found a note under Williams’ desk referring to parties and the use of the “rich man’s

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<sup>2</sup>See “Strip Searches” (Updates) in **Quarterly Report**, October-December: 2007 for a discussion of the panel decision. The panel decision has been superseded by the *en banc* decision discussed both in this article and in “Strip Searches” *infra* under **Updates**.

drug.” Williams stated the note was a joke. The teacher later threw the paper away. The principal spoke with relatives of the two girls about his concerns. The father of the other girl expressed his concerns that his daughter might be using drugs. Several other incidents involving other students were also reported to the principal during this time. *Id.*

The original student who was questioned by the principal reported later in the same week that the two girls were once again engaged in what appeared to be drug use. The principal and the assistant principal (who was female) asked the two girls to leave class. Neither appeared to be intoxicated or disoriented. The girls were taken to the principal’s office where he confronted them with his suspicions. One of the girls produced a small brown vial that contained “rush,” an over-the-counter substance that is volatile. While its purchase is not illegal in Kentucky, where the high school is located, its inhalation is illegal. *Id.* at 882-83. The principal decided to search the girls’ lockers because the vial did not match the description provided by the student informant. *Id.* at 883. A search of the girls’ lockers and purses did not turn up any contraband.

Williams was escorted to the assistant principal’s office where, in the presence of a secretary, she was asked to empty her pockets, take off her socks and shoes, lower her pants to her knees, and take off her T-shirt. The parties dispute whether the assistant principal pulled at the elastic on Williams’ underwear to see whether anything fell out. The search was conducted pursuant to school policy.<sup>3</sup> *Id.* This search also failed to reveal any contraband. Williams sued, asserting the strip search violated her Fourth and Fourteenth Amendment rights. The Federal district court granted summary judgment to the school defendants. The 6<sup>th</sup> Circuit Court of Appeals affirmed. The school board’s search policy was considered “a facially valid district-wide policy, allowing for the search of a pupil’s person if there is a reasonable suspicion that the student is concealing evidence of an illegal activity.” *Id.* at 884.

In this case, the search satisfies *T.L.O.*’s two-pronged requirement that the search be justified at its inception and that the search was reasonable in its scope, and not excessively intrusive in light of the age and sex of the student given the nature of the suspected infraction. *Id.* at 886. “Defendants were not unreasonable in suspecting, based on the information available at the time, that a search of Williams would reveal evidence of drugs or drug use. Further, Defendants were not unreasonable, in light of the item sought (a small vial containing suspected narcotics), in conducting a search so personally intrusive in nature.” *Id.* at 887.

A student informant approached the principal and provided him with information that implicated Williams in the use of a white powdery substance during class. The principal did not rely solely upon the student informant’s statements, although he was satisfied she had no ulterior motive for providing the information. Rather, the principal advised the families of the two girls of his concerns and was advised by the father of one of the girls that he suspected his daughter may be

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<sup>3</sup>The policy stated in relevant part: “A pupil’s person will not be searched unless there is reasonable suspicion that the pupil is concealing evidence of an illegal act.... When a pupil’s person is searched, the person conducting the search shall be the same sex as the pupil; and a witness of the same sex shall be present during the search....” 936 F.2d at 883, *n.* 2.

using drugs. The principal also spoke with the classroom teacher, who related the strange incident of the written note under Williams' desk. Later in the week, the original student informant again advised the principal the two girls were again engaged in drug activity in class. When confronted, one of the girls produced a brown vial containing contraband. *Id.*

Based on these facts, the search was not unreasonable at its inception, nor was the scope of the search unreasonable given that the item sought was a small glass vial suspected of containing a narcotic. In addition, lesser intrusive means were employed to locate the suspected vial (search of purses, lockers), which, when no contraband was located, led to a reasonable suspicion that the vial may be concealed on Williams' person. The other girl's production of a vial containing "rush" warranted further investigation. *Id.*

The 6<sup>th</sup> Circuit noted that all Supreme Court cases involving tips from informants and whether such tips could support reasonable suspicion involved law enforcement. From these cases, it appears that a school administrator would not be restricted to personal observations alone but could rely upon an informant's tip where there was some "independent indicia of reliability." (that is, some means of corroborating the disclosed information as well as the reliability of the informant in the past). *Id.* at 888. Sometimes, reasonable suspicion based on an informant's tip is analyzed under a "totality-of-the-circumstances" inquiry. In *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412 (1999), an anonymous telephone caller informed law enforcement that White would be traveling by car from her apartment to a local motel, and that she would be possession of cocaine. The caller provided very specific details, including White's address, the model and make of the car she would be driving, her destination, and the type of container she had secreted the cocaine. Police officers went to the address and followed White to the motel, where they arrested her. The Supreme Court suggested that a tip from a known and reliable informant, absent any corroboration, may be sufficient to form reasonable suspicion and justify the detention of an individual. In *White*, however, the informant was anonymous. Typically in the case of an anonymous tipster, depending upon the quality and quantity of the information supplied, further investigation would be authorized in order to justify any subsequent stop of an individual. This is referred to as the "totality of the circumstances" inquiry.

Reasonable suspicion, like probable cause, is dependent upon both the content of the information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the "totality of the circumstances—the whole picture," that must be taken into account when evaluating reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.

*White*, 110 S. Ct. at 2416 (citations omitted). The 6<sup>th</sup> Circuit correlated the allegations of a student who has implicated a fellow student in unlawful activity to the case of the informant's tip.

While there is concern that students will be motivated by malice and falsely implicate other students in wrongdoing, that type of situation would be analogous to the anonymous tip. Because the tip lacks reliability, school officials would be

required to further investigate the matter before a search or seizure would be warranted.

936 F.2d at 888-89. In this case, the informant was not anonymous. The principal did question the student to ensure that she was not motivated by an improper purpose. Although her information was unverified, it was deemed reliable. There was also additional information other than the informant's tip, including Williams' letter, the suspicions of the other girl's father, and the production of a brown vial containing "rush."

Based on the totality of the circumstances, there existed both the quality and quantity of information for [the principal] to reasonably suspect Williams was concealing evidence of illegal activity.

*Id.* at 889.

The Second Circuit addressed student informants in *Phaneuf v. Fraikin et al.*, 448 F.3d 591 (2<sup>nd</sup> Cir. 2006). At the time the dispute arose, Kelly Phaneuf was a high school senior. The students were preparing to attend an off-campus senior class picnic. School officials performed a pre-announced search of all student bags for security purposes. A package of cigarettes was found in Phaneuf's purse. However, she was of sufficient age to legally possess the cigarettes, but cigarettes were not permitted on campus.

Another student told a teacher that Phaneuf indicated to her and others she had marijuana and that she would hide the contraband "down her pants" during the mandatory bag search. The teacher reported this to the principal. The teacher believed the student informant to be reliable and trustworthy. The principal was familiar with the informant because she had previously worked as an office aide. The informant also provided the names of the four other girls who heard Phaneuf make this statement.

The principal boarded the bus and asked Phaneuf to disembark. Phaneuf was advised that a fellow student had indicated Phaneuf possessed marijuana. Although the parties dispute some of the particulars, it appears Phaneuf was taken to the nurse's office where, with her mother present but over her mother's objections, the mother was instructed to conduct a strip search of her daughter while the school nurse observed. No contraband was found. Phaneuf sued, alleging violations of her Fourth Amendment rights.

The Federal district court found the search was reasonable, both at its inception and in scope, finding that it was not excessively intrusive in light of Phaneuf's age and sex, given the nature of the suspected infraction. The strip search was conducted in relative privacy with only women involved, including Phaneuf's mother. 448 F.3d at 594-95.

The Second Circuit Court of Appeals reversed the decision of the district court. The Second Circuit stated that the "requirement of reasonable suspicion is not a requirement of absolute certainty but only of sufficient probability." *Id.* at 596. However, for a search to be "permissible in its scope" under *T.L.O.*, the "measures adopted" must be "reasonably related to the objectives

of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.*

The 7<sup>th</sup> Circuit in *Cornfield* recognized that “as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness.” *Id.* at 597.

The question, then, for us is whether the school officials had a reasonably high level of suspicion that Phaneuf had marijuana on her person to justify an intrusive, potentially degrading strip search. In addressing this question, we review the totality of the circumstances, looking first at those that might have created a reasonable suspicion that such a search was justified at its inception. This review necessarily requires us to base our determination on only those facts known to the school officials *prior* to the search.

*Id.* The school defendants stated there were four factors that support the reasonableness of their subsequent search: (1) the tip came from a fellow student; (2) Phaneuf’s had a history of disciplinary problems; (3) Phaneuf’s denial of any wrongdoing was not deemed credible by the teacher and principal; and (4) the discovery of cigarettes in her purse.

### **The Student Tip**

The 2<sup>nd</sup> Circuit observed that the Supreme Court has instructed courts to evaluate the tips of informants based on the “totality of the circumstances.”

The totality of the circumstances includes an informant’s veracity, reliability, and basis of knowledge, as well as whether the information an informant has provided is corroborated by independent investigation, because an informant who is right about some facts is more likely to be right about others.

*Id.* at 598. In this case, the student informant supplied her information directly to a teacher. A “face-to-face informant must, as a general matter, be thought more reliable than an anonymous tipster, for the former runs the greater risk that he may be held accountable if his information proves false.” *Id.* (citation and internal punctuation omitted). In addition, the student received her information—which was relatively specific as to the type and location of the drugs at issue—from Phaneuf herself. The student informant did not actually see the marijuana, nor did she state that she had or that she had observed Phaneuf putting anything down her pants. *Id.*

Although the teacher and the principal both stated they considered the student informant to be trustworthy, they provided no reasons for why they held this opinion. “As a general rule, we are wary of vague or conclusory statements about an informant’s reliability.” *Id.* There was no evidence the teacher or principal had ever relied upon information from the student in the past or knew her to be a reliable source of information. The record also indicates the principal was not aware of the source of the information *prior* to the strip search. *Id.*

After receiving the tip, the principal did not investigate, corroborate, or otherwise substantiate the tip prior to the strip search of Phaneuf. The principal's "acceptance of one student's accusatory statement to initiate a highly intrusive search of another student—with no meaningful inquiry or corroboration—concerns us." *Id.*

While the uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search.

*Id.* at 598-99.

### **Student's Disciplinary History**

A student's disciplinary history could be relevant, as it was in *Cornfield*. However, none of Phaneuf's past disciplinary infractions involved drug use. "Disciplinary problems by themselves are not necessarily indicia of drug abuse, because most school discipline problems do not involve drug abuse[.]" In this case, the court was "unconvinced that Phaneuf's past discipline...adds much of significance in determining the reasonableness of the initiation of a highly intrusive search, whose only purpose was to find drugs." *Id.* at 599.

### **The "Manner" of the Student's Denial**

Both the teacher and the principal did not accord much credibility to Phaneuf's denial that she possessed marijuana. "Under certain circumstances, the manner in which a person acts when confronted by law enforcement officials can be grounds for raising a reasonable suspicion to conduct a limited search[.]" *Id.* Examples of such behavior include "furtive movement" or "evasive flight." In this case, "we are given little to work with." Although school officials indicated Phaneuf denied the accusations in a "suspicious" manner, neither provided any further detail as to what "suspicious manner" might have meant. "[W]e are reluctant to permit it to supply justification for a strip search." *Id.*

### **Other Contraband in the Student's Purse**

There is a "tenuous connection" at best between the discovery of cigarettes in Phaneuf's purse and the alleged possession of marijuana on her person "so as to be of relatively little consequence in deciding whether the strip search for drugs was reasonable." *Id.* In this case, school officials discovered the cigarettes initially *before* the student informant provided the tip. Later, while waiting for Phaneuf's mother to arrive, the principal re-discovered the cigarettes in Phaneuf's purse. "These facts raise questions as to whether [the principal] had made up her mind to conduct the search *before* she re-checked the bag." *Id.* at 600 (emphasis original).

The "probative force of the cigarette find is limited, at best." It has little relevance in the determination as to whether Phaneuf brought marijuana to school or was smuggling it in her clothes. *Id.*

The school acted unreasonably in treating all contraband alike: Surely, a discovery of cigarettes cannot alone support a suspicion that a student is carrying a firearm or is bootlegging gin. Without further explanation, the school cannot vault from the finding of one type of (commonly used) contraband, to a suspicion involving the smuggling of another.

*Id.* This case depends upon whether the student tip was sufficient either by itself or in conjunction with the other factors to create a reasonable suspicion that Phaneuf possessed marijuana on her person such that a strip search would be justified.

We are dubious that the other factors the district court relied on—the prior non-drug-related disciplinary problems; the suspicious manner in which Phaneuf denied the accusation; or the presence of cigarettes in her purse—add much to the reasonable-under-the-circumstances calculus.

*Id.* Because the “justified at its inception” prong of *T.L.O.* was not met, the district court decision in favor of the school defendants was reversed. *Id.*

## **SOCIAL NETWORKING, PUPIL DISCIPLINE, AND FREE SPEECH**

An administrator at an Indianapolis-area private school sued Facebook.com,<sup>4</sup> a popular social networking website after unidentified pranksters created a fake profile of the administrator, which they then used to send e-mails to other students at the private school. The administrator claimed the phony profile allegedly “contained false, embarrassing, and defaming information” about the administrator and the private school.<sup>5</sup> Facebook removed the webpage when the administrator complained, but it would not disclose the identity of the creators without a court order.<sup>6</sup>

A Georgia high school science teacher brought criminal charges against a student who created a fake MySpace<sup>7</sup> profile of him, allegedly stating that the teacher liked Michael Jackson and was “having a gay old time.”<sup>8</sup>

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<sup>4</sup>Facebook.com is a registered trademark of Facebook, Inc.

<sup>5</sup>“Roncalli Dean Sues Over False Facebook Page,” *The Indianapolis Star* (May 9, 2008).

<sup>6</sup>*Id.*

<sup>7</sup>MySpace.com is a registered trademark of MySpace, Inc.

<sup>8</sup>*MySpace and Its Relatives: The Cyberbullying Dilemma, ELA Notes* (Kathleen Conn and Kevin P. Brady, 2008).

Social networking sites<sup>9</sup> such as Facebook and MySpace.com (and hundreds of others) are exceedingly popular among middle school and high school students, as well as young adults. Access is free or low cost. Users can create and update personal “profiles.” They can interact with other people (“friends”) whom they permit access to their webpage. Weblinks are formed. Instant messaging through computers,<sup>10</sup> text messaging via cell phones,<sup>11</sup> blogs,<sup>12</sup> and chat rooms<sup>13</sup> all keep teenagers and young adults in 24-hour contact.

Such instantaneous and pervasive communications in the hands of adolescents can have unfortunate results.<sup>14</sup> In the remote past, before such accessible means of communication, students likely made disparaging, maybe even defamatory remarks about their teachers and other school personnel. Such remarks rarely went beyond a student’s immediate circle of acquaintances. With modern technology, students are still engaged in making denigrating remarks about school personnel, but the audience is potentially much larger—the entire world.

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<sup>9</sup>Social networking websites are Internet sites where users can create online “profiles,” which are individual webpages where they post messages, photographs, and video about themselves or their interests. Once a user creates a profile, the user can extend “friend” invitations to others to view the pages and share e-mail, instant messages, or blogs.

<sup>10</sup>Instant Messaging (IM) is used to send Internet messages between two specific users. IMs can be viewed only by the two individuals communicating. “Like a chat room, IM is used to send messages back and forth through the Internet to a specific user. It is like a chat room in the way that you communicate, but unlike most chat room communications, the information that is being typed is sent directly to the user and is not viewed by anyone else.” *Chivers v. Central Noble Community Schools*, 423 F.Supp.2d 835, 841-42, n. 1 (N.D. Ind. 2006) (high school student sued her math teacher, alleging sexual harassment that occurred, in part, through IM communications).

<sup>11</sup>Text Messaging is also known as Short Message Service (SMS). It allows brief messages to be displayed in text on a cell phone.

<sup>12</sup>“Blog” is short for “web log.” A “blog” is “an online personal journal with reflections, comments, and often hyperlinks provided by the writer.” *McCabe v. Basham*, 450 F.Supp.2d 916, 925, n. 4 (N.D. Iowa 2006). A “blogger” is one who writes a “blog,” while “blogging” is the act of posting information on the “blog” or reading information posted by others on a “blog.” The “blogosphere” is the universe where all “blogs” and “bloggers” (and their readers) are engaged in “blogging.” See, e.g., *U.S. v. Conrad Black*, 483 F.Supp.2d 618, 621 (N.D. Ill. 2007) (“The case has generated similarly intense commentary in the blogosphere”).

<sup>13</sup>A “chat room” is a virtual “room” where people communicate in real time using the Internet. Visitors type their messages with a keyboard and the entered text appears on the monitor, along with the text of the other chat room visitors.

<sup>14</sup>See, e.g., *Computers and Online Activity: Student Free Speech and “Substantial Disruption,” Quarterly Report* October-December: 2006; and *Cell Phones and Electronic Communication Devices: Balancing School Purposes with Personal Preferences, Quarterly Report* January-March: 2008.



Adolescents are adolescents, and they are prone to serious lapses of judgment. One phenomenon arising from the admixture of technology with immature perspective has been the creation of fake “profiles” of school personnel. Oftentimes, these “profiles” are created off-campus and on personal computers. The content, however, is where the controversy arises, followed closely by the degree of access. Is this protected free speech (*i.e.*, parody)? Is this “speech” a school district may punish? Is this speech that is defamatory such that damages may be awarded?

Any First Amendment analysis of student speech within a public school context must begin by reference to the U.S. Supreme Court’s four school-speech cases, none of which actually involves technology-enabled “speech” or even off-campus speech that may find its way on-campus:

1. *Tinker v. Des Moines Independent Community School District*, 393 U.S.503, 507-08, 514 89 S. Ct. 733 (1969) (“pure speech” in a school context cannot be banned absent a substantial disruption or material interference with school function or a reasonable forecast of substantial disruption, or interference with rights of others).
2. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681, 683, 685-86, 106 S. Ct. 3159 (1986) (student’s sophomoric speech—which contained offensive, indecent, and lewd references—was not protected speech and could be regulated because vulgar or indecent speech and lewd conduct in the classroom or school context is inconsistent with the fundamental values of public school education).
3. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 270-71, 273-76, 108 S. Ct. 562 (1988) (school could exercise editorial control over the style and content of student articles in school newspaper because newspaper was part of journalism class experience and, accordingly, was part of a school-sponsored expressive activity; however, such editorial control must be “reasonably related to legitimate pedagogical concerns.”).
4. *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (a message reasonably viewed as advocating illegal drug use—“Bong HiTS 4 Jesus”—need not result in a substantial disruption before school officials could restrict such speech on school property or at a school event).

On September 11, 2008, a federal district court issued the latest decision involving public school students and potential transgressions of school rules through social networking. In *J.S., et al. v. Blue Mountain School District, et al.*, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa., September 11, 2008), a middle school student and her friend created a bogus personal profile of her principal at MySpace.com. The imposter profile was created off-campus using the home computer of J.S. It was not created during school hours. The profile did not identify the principal by name but did include his photograph (taken from the school district’s website). The “profile” described the principal in unsavory terms, indicating he is bisexual, a sex addict, and a pedophile. The language is immature and vulgar. The address (“url”) for the profile included the phrase “kids rock my bed.” *Id.* at \*2-3.

News of the profile spread through the middle school. There was a general “buzz” in the school with quite a few students aware of the profile. *Id.* at \*4.

J.S. later removed the MySpace profile to a “private” setting, where only those who receive the profile creator’s permission can view the profile. J.S. and her friend granted access to 22 individuals. The principal learned of the profile. A teacher also informed him that students were talking about the profile. *Id.* at \*4-5.

The principal confronted J.S. about the profile. Although she initially denied any involvement, she later admitted she had created it with her friend. The principal spoke to the parents of the two girls and requested MySpace.com to remove the profile.

The principal determined that J.S. had violated the school’s discipline code, which prohibits the making of false accusations against school personnel. He also determined she violated the school’s computer usage policy by using copyrighted material without permission (the use of his photograph from the school district’s website). J.S. received a 10-day suspension from school. *Id.* at \*5-6.

Rather than appeal the suspension to the school board, J.S. and her parents sued the school district and certain personnel (including the principal) for purportedly violating her First Amendment rights. J.S. claimed the fake profile was protected speech, that it was “non-threatening, non-obscene and a parody.” She believed the school unconstitutionally disciplined her for out-of-school conduct that did not cause a disruption of classes.<sup>15</sup> J.S. and her parents sought injunctive relief, but the district court denied this. See *J.S., et al. v. Blue Mountain School District, et al.*, 2007 U.S. Dist. LEXIS 23406 (M.D. Pa., March 29, 2007).

The district court found “unconvincing” J.S.’s argument that, based on *Tinker*, the school district impermissibly restrained her speech especially where the school district has not established that her speech caused or was likely to cause a substantial and material disruption at the school. *Id.* at \*10. The district court noted that *Tinker* does not protect speech that invades the rights of others, noting that the Supreme Court in *Tinker* found that a student may express the student’s opinions during school hours if to do so would not materially and substantially interfere with the operation of the school “and without colliding with the rights of others.” Student conduct that, in part, constitutes an “invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” *Tinker*, 393 U.S. at 513. In this case, J.S.’s speech did affect the principal’s rights. “As a principal of a school, it could be very damaging to have a profile on the Internet indicating that he engages in inappropriate sexual behaviors.” *Id.* at \*18-19, *n.* 4.

*Fraser* may also apply. As the Supreme Court noted, “[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.... Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the schools.” *Fraser*, 478 U.S. at 683.

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<sup>15</sup>The parents also asserted a violation of their Fourteenth Amendment rights to determine how best to raise, nurture, discipline and educate J.S. This claim is not pertinent to this article and will not be discussed.

A school can validly restrict speech that is vulgar and lewd and also it can restrict speech that promotes unlawful behavior. In the instant case, there can be no doubt that the speech used is vulgar and lewd.... The speech does not make any type of political statement. It is merely an attack on the school's principal. It makes him out to be a pedophile and sex addict. This speech is not the *Tinker* silent political protest. It is more akin to the lewd and vulgar speech addressed in *Fraser*. It is also akin to the speech that promoted illegal actions in the *Morse* case. The speech at issue here could have been the basis for criminal charges against J.S. Additionally, the state police indicated to [the principal] that he could press harassment charges based upon the imposter profile.... Thus, as vulgar, lewd, and potentially illegal speech that had an effect on campus, we find that the school did not violate the plaintiff's rights in punishing her for it even though it arguably did not cause a substantial disruption of the school.

*Id.* at \*17-18. The district court also found that J.S. can be disciplined for her off-campus activity of creating the phony MySpace profile.

The facts that we are presented with establish much more of a connection between the off-campus action and the on-campus effect. The website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website. Plaintiff crafted the profile out of anger at the principal for punishment the plaintiff had received at school for violating the dress code.... J.S. lied in school to the principal about the creation of the imposter profile. Moreover, although a substantial disruption so as to fall under *Tinker* did not occur,... there was in fact some disruption during school hours. Additionally, the profile was viewed at least by the principal at school and a paper copy of the profile was brought into school. On these facts, and because the lewd and vulgar off-campus speech had an effect on-campus, we find no error in the school administering discipline to J.S.

*Id.* at \*21-22. The district court distinguished this case from *Layshock* (see *infra*). The district court in that case noted it was a "close call" in finding that the school had violated Layshock's First Amendment right for punishing him for his off-campus parody. "We find that the facts of our case include a much more vulgar and offensive profile [than in *Layshock*], and we come out on the other side of what the court deemed to be a 'close call.'"<sup>16</sup> *Id.* at \*25-26.

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<sup>16</sup>The school district also argued that J.S.'s "speech" was not constitutionally protected because it was defamatory. J.S. asserted it was protected speech as a "parody." The court declined to address this issue because it found J.S.'s discipline to be appropriate and her speech unprotected through other means. *Id.* at \*26.

The district court observed that modern modes of communication tend to blur past distinctions.

We acknowledge that the line between on-campus and off-campus speech is blurred with increased use of the Internet and the ability of students to access the Internet at school, on their own personal computers, school computers and even cellular telephones. As technology allows such access, it requires school administrators to be more concerned about speech created off campus—which almost inevitably leaks onto campus—than they would have been in years past.

*Id.* at \*19-20, *n.* 5.

### **Indiana's Foray Into Cyberspace and Student Speech**

*A.B. v. State of Indiana*, 885 N.E.2d 1223 (Ind. 2008). During the 2005-2006 school year, A.B. was a middle school student. The principal learned sometime around February of 2006 that a vulgar tirade had been posted on MySpace.com, a “social networking site” where individuals can create “profiles” that list their various interests. They can also post pictures, music, and videos, and can determine whether their profiles will be public or private. Most users on MySpace are between the ages of 14 and 34 years of age. The principal investigated. He learned there was a public profile under his name where A.B. had posted a vulgarity-laced tirade directed toward him. Another middle school student had created a private “profile” using the principal’s name, which was available to 26 designated “friends,” including A.B.

Delinquency proceedings were initiated against A.B., alleging that her conduct, if committed by an adult, would constitute Harassment, a Class B misdemeanor.<sup>17</sup> A.B.’s messages were laced with rather juvenile “vulgar expletives” directed at both the school corporation and the principal.

Even though A.B.’s vulgar rantings were not sent directly to the principal, it was likely that such messages would find their way to the school. The communications were not “legitimate” and could only have been made with the intent to harass, annoy, or alarm. The trial court found A.B. to be delinquent. *Id.* A.B. appealed to the Court of Appeals, which reversed, finding that A.B.’s messages were protected political speech. See *A.B. v. State of Indiana*, 863 N.E.2d 1212 (Ind. App. 2007), *reh’g denied*. The Supreme Court granted transfer and reversed the trial court, but for a different reason: The State did not prove all of the statutory elements for the offense of Harassment. *Id.*

For a person to commit an act with the intent to harass, annoy, or alarm another person, common sense informs that the person must have a subjective expectation

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<sup>17</sup>I.C. § 35-45-2-2(a)(4) (“A person who, with intent to harass, annoy, or alarm another person but with no intent of legitimate communication:...(4) uses a computer network...or other form of electronic communication to (A) communicate with a person; or (b) transmit an obscene message or indecent or profane words to a person; commits harassment, a Class B misdemeanor”).

that the offending conduct will likely come to the attention of the person targeted for the harassment, annoyance, or alarm.

*Id.* The Indiana Supreme Court noted that its analysis may rely upon whether the postings were public or private. The trial court found that A.B.'s postings, either private or public, were accessible by other students and, in some cases, the public.

Some of A.B.'s purportedly harassing communications were posted on her friend's MySpace "private profile" site. These messages could not be seen by the general public except for those persons accepted as "friends" by the creator of the "profile." The principal was able to view the postings only after the student who established the "profile" granted him access. There was no evidence at the trial court level that A.B. expected the principal to see or learn about her messages. There was no probative evidence or reasonable inferences that would establish A.B. "had a subjective expectation that her conduct would likely come to the attention of [the principal]." *Id.*

The analysis is different, however, for A.B.'s remarks that appeared on the MySpace "group" page, which was accessible by the general public. "[I]t may be reasonably inferred that A.B. had a subjective expectation that her words would likely reach [the principal]." This, alone, does not establish the requisite intent element of the Harassment statute. "To commit the offense of Harassment, a person must have 'the intent to harass, annoy, or alarm another person *but with no intent of legitimate communication.*'" *Id.* (emphasis by court). Her posting to the "group" page, although containing some vulgarities, mostly expressed her "anger and criticism of the disciplinary action of [the principal] and [the middle school] against her friend, the creator of the private 'profile.'" This affirmative proof makes it impossible for the State to have carried its burden to prove '*no intent of legitimate communication.*'"<sup>18</sup> *Id.*

The Supreme Court disagreed with the trial court that A.B.'s communications lacked any intent other than to harass, annoy, or alarm the principal. The highest court also considered A.B.'s age.

We also observe that it is even more plausible that A.B., then fourteen years old, merely intended to amuse and gain approval of notoriety from her friends, and/or to generally vent anger for her personal grievances. Reviewing the evidence presented at the fact-finding hearing, we conclude that there was insufficient substantial evidence of probative value to prove beyond a reasonable doubt that A.B. had the requisite intent to harass, annoy, or alarm [the principal] when she made the postings.

*Id.*

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<sup>18</sup>According to A.B.'s posting, her friend was expelled for creating the private "profile" of the principal, which would require her to repeat the eighth grade. She was also grounded and lost her computer privileges. She referred to the middle school as "full of over-reacting idiots!" *Id.*

## Threatening Communications

In *Wisniewski v. Bd. of Education of the Weedsport Central School District*, 494 F.3d 34 (2<sup>nd</sup> Cir. 2007), *cert. den.*, 128 S. Ct. 1741 (2008), an eighth-grade student created an icon for use on his personal computer (Instant Messaging with his friends) that depicted a pistol firing a bullet at the head of a person. Below the drawing were the words, “Kill Mr. VanderMolen” (his English teacher). Although he did not create this icon at school and did not send it to any school official, the English teacher learned of the drawing. The student was eventually suspended for a semester. His parents sued, alleging the discipline violated the student’s free-speech rights. The federal district court and the U.S. Second Circuit Court of Appeals found the “speech” in question was not protected speech, as contemplated by *Tinker* or *Morse*. The icon constituted misconduct that posed a reasonably foreseeable risk that would materially and substantially disrupt the work and discipline of the school. It was immaterial that the icon was transmitted off-campus using non-school equipment. It was reasonably foreseeable the icon would reach school officials. The speech was not only offensive, it was threatening. The student was aware that the making of threats was considered a material disruption.

A “substantial disruption” can include student insults so cruel and severe that a teacher was forced from her classroom. In *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002), a middle-school student created a website on his home computer called “Teacher Sux” and posted it on the Internet. The site was dedicated to insulting school personnel, particularly his algebra teacher. His website featured profane language directed towards the teacher, a graphic that showed her picture with her head morphing into Adolph Hitler’s visage, a picture showing the teacher with her head cut off, a list of reasons why she should die, and a special section where the student solicited donations to fund a hitman to kill the teacher. The teacher was so upset by the content of the website that she had to take a medical leave and begin taking medication for anxiety and depression. The school attempted to permanently expel the student from school for making a threat to a teacher. Using a *Tinker* analysis, the court held the school could constitutionally discipline the student because his website constituted a substantial disruption in that it caused the teacher’s absence and thus deprived the other students of their regular classroom teacher. *Id.* at 869. It is also noteworthy that although the student’s “speech” occurred off campus, he facilitated the on-campus speech by accessing the website of a school computer to show the website’s content to another student so as to publicize its existence. *Id.* at 865.

## Off-Campus Activity; On-Campus Effect

A continuing dispute involves Justin Layshock and the Hermitage School District. Layshock posted a “parody profile” of his principal on a MySpace.com website. The profile contained the principal’s photograph (copied from the school district’s website) and his purported answers (mostly vulgar) to an online survey. Layshock created the profile on his own time, using his grandmother’s computer. The profile created something of a “buzz” around the school, so much

so that the computer system crashed when numerous students attempted to access the site using the school's computers. The school sought to discipline Layshock, arguing that his conduct, even though it occurred off-campus during non-school time and through the use of non-school equipment, nevertheless constituted a substantial disruption within the school district. Such speech, the school asserted, is not protected speech under *Tinker*. The federal district court found that this may be so and, accordingly, denied Layshock's motion for temporary injunction to prevent the school from disciplining him. *Layshock v. Hermitage School District*, 412 F.Supp.2d 502 (W.D. Pa. 2006).

Later, after the record had been more fully developed, the federal district court found the school district did violate Layshock's First Amendment rights. In *Layshock v. Hermitage School District*, 496 F.Supp.2d 587 (W.D. Pa. 2007), the court applied *Tinker* and found that Layshock's conduct did not cause a substantial disruption within the school, nor was it likely to. His parody was but one of several directed at the principal (the identities of the authors of the other three parodies were never discovered).

The threshold, and most difficult, inquiry is whether the school administration was authorized to punish [Layshock] for creating the profile. The mere fact that the Internet may be accessed at school does not authorize school officials to become censors of the world-wide web. Public schools are vital institutions, but their reach is not unlimited. Schools have an undoubted right to control conduct within the scope of their activities, but they must share the supervision of children with other, equally vital, institutions such as families, churches, community organizations, and the judicial system.

496 F.Supp.2d at 597. The court recognized that a school district could discipline a student for off-campus conduct, but where the off-campus conduct involves student speech, the school "must demonstrate an appropriate nexus." *Id.* at 599. In this case, the nexus could not be established. There was insufficient evidence that it was Layshock's parody, rather than the other three, that caused the "buzz" in the school. More disruption was created by the school in the conduct of its investigation than by the parodies. Any disruption that may have occurred was minimal: no classes were cancelled, no widespread disorder occurred, there was no violence of any sort. Layshock was entitled to summary judgment on his First Amendment claim.

On October 23, 2007, the federal district court denied the school district's motion for entry of final judgment so that it could appeal to the U.S. Third Circuit Court of Appeals. The district court noted that the case has not been fully disposed: There has not yet been a determination of the amount of Layshock's compensatory damages and attorney fees. *Layshock v. Hermitage School District*, 2007 U.S. Dist. LEXIS 78524 (W.D. Pa., October 23, 2007).

*Requa v. Kent School District No. 415*, 492 F.Supp.2d 1272 (W.D. Wash. 2007) involved both on-campus and off-campus activity. Gregory Requa secretly videotaped one of his high school teachers in her classroom and then posted the video on YouTube.com, accompanied by lewd remarks and gestures, along with the song "Ms. New Booty," a reference to her posterior. Requa

drew a 40-day suspension for his artistic endeavors. He sued, asserting the school's disciplinary action violated his First Amendment free-speech rights (as well as his Fourteenth Amendment due process rights). The federal district court declined to grant Requa's request for injunctive relief to reinstate him in school. Although the federal district court conceded his off-campus efforts (the posting of the video) may have been protected speech, his surreptitious filming of the teacher occurred on-campus. The school district had a policy against sexual harassment and a policy against the use of electronic devices in school, both of which Requa violated. His suspension (which would be reduced 20 days upon completion of writing assignment) was not excessive. A student does have a legitimate right to critique the performance and competence of teachers, but this right must be balanced against the school district's responsibility to provide a safe and supportive learning environment for students and teachers alike.

### **Defamation; Negligent Supervision**

Anna Draker is a vice principal of a high school in Texas. She learned that two students had created a profile of her on MySpace.com. The website, purportedly created by Draker, contained her name, photo, and place of employment. The site contained explicit and graphic sexual references, asserting she engaged in lewd and offensive behavior and that she was a lesbian. She sued the students and their parents, asserting claims, *inter alia*, for defamation (by the students) and negligent supervision (by the parents).<sup>19</sup>

Although this suit is pending, a recent decision affirming the trial court's grant of summary judgment to the defendants on some of her claims, the concurring opinion of Court of Appeals Justice Catherine Stone is pointed:

The Internet capabilities of modern society present numerous opportunities for individuals to engage in extreme and outrageous conduct that can have severe emotional distress.

***Draker v. Schreiber, et al.***, 2008 Tex. App. LEXIS 6117 at \*19 (Tex. App., August 13, 2008). Justice Stone may have indicated what liability may be imposed.

The conduct of the students in this case is, in my opinion, outrageous. Simply stated, it is not acceptable conduct in our society. The school children of this state should know that appropriating the identity of a teacher or school administrator to create a fraudulent Internet social profile is unacceptable, and that engaging in such conduct will have consequences.

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<sup>19</sup>This case differs from *J.S. v. Blue Mountain School District*, *supra*, in several respects. In *Blue Mountain*, the principal's name was not used. The fake profile also indicated he was from Alabama and not Pennsylvania. The fake profile did use his picture. Although the federal district court indicated that the fake profile may have been criminal, the principal elected not to pursue charges against J.S. and her friend.



*Id.* at \*17.

## **Conclusions**

Although it is difficult to draw any definitive conclusions given the nature of social networking and the dearth of case law on point, some commonalities seem to be emerging.

Although a student may create a bogus profile off-campus during non-school hours and on the student's own computer, it is still possible for such an activity to pose a substantial disruption or material interference with the functioning of the school. Most school districts block access to social networks through the school's computer network; however, students may still access such sites through their personal electronic devices while at school.

The courts have not found that the creation of a general "buzz" around school is sufficient to constitute a substantial disruption or material interference using a *Tinker* analysis. (See *J.S. v. Blue Mountain School District*, and *Layshock v. Hermitage School District*.) However, speech that invades the rights of others is not protected under *Tinker*. (See *J.S. v. Blue Mountain Sch. Dist.* and *Requa v. Kent School District No. 415*.)

While a profile may have been created away from school grounds and on personal time, the pervasive nature of the Internet typically ensures such speech will find its way into the school district. A school district need not tolerate student speech that is lewd, vulgar, or obscene, irrespective of its origin where it has found its way onto the school campus. (See *J.S. v. Blue Mountain Sch. Dist.*) A school district may also restrict speech that advocates or promotes unlawful or illegal activity. (See *J.S. v. Blue Mountain Sch. Dist.*)

Some electronic communications by students may be criminal in nature; however, some communications—even when vulgar—may nevertheless be legitimate forms of protected speech. The age and maturity of the student may be factors. (See *A.B. v. Indiana*.) Non-defamatory parody profiles might be protected speech. (See *Layshock v. Hermitage Sch. Dist.*)

The communicating of a threat to school personnel will likely be considered a substantial disruption or material interference. (See *Wisniewski v. Weedsport Central Sch. Dist.* and *J.S. v. Bethlehem Area Sch. Dist.*)

Some social networking speech may run afoul of school rules and policies, such as acceptable computer usage policies; policies against sexual harassment, intimidation, or bullying; policies against the making of false accusations or threats; or other rules intended to ensure a safe and secure campus or to restrict speech that would invade the rights of others.

## COURT JESTERS: HISTORECTOMY

Spanish-American philosopher, essayist, and poet George Santayana is particularly noted for his observation that “[t]hose who cannot remember the past are condemned to repeat it[.]”<sup>20</sup>

But what if one does not know the past to begin with?

Past is prologue,<sup>21</sup> Shakespeare tells us, so some background is necessary. *Roger Hall v. W. A. Brookshire*, 285 S.W.2d 60 (Mo. App. 1955) was a defamation action, one of many criminal and civil lawsuits that involved Brookshire, a lawyer who took up farming after World War II. By all accounts, Brookshire was a most disagreeable person. He sued and was sued often. He shot to death two men. He starved to death some of his cattle. He was imprisoned for murder, but when the acting governor commuted his sentence, he *fought* that.

His neighbor was Mrs. Bessie B. Hall. Brookshire’s cattle would roam onto her land, much to her chagrin. Perhaps believing Robert Frost’s belief that “Good fences make good neighbors,”<sup>22</sup> Mrs. Hall set about establishing a fence to keep Brookshire’s cattle off her property and thereby maintain some semblance of peace.

Meanwhile, Brookshire had sued a man named Anderson in an attempt to recover legal fees Brookshire claimed he was owed. Anderson called Roger Hall, Bessie’s son, as a witness and asked him what Brookshire’s reputation was in the community. Hall testified that Brookshire’s reputation was bad.

A month later, Brookshire wrote to Bessie detailing his grievances with her proposed fence and, of course, threatening legal action. Near the end of the letter, he slipped in the following:

It is little wonder that your son, who possesses the type of mentality that he does, would go into Court and commit perjury simply because a man has tried to get a decent fence.

285 S.W.2d at 63. Roger Hall sued Brookshire for defamation. At the trial, Hall called 12 witnesses, all of whom testified that Brookshire’s reputation in the community was bad. There would have been more such testimony, but the trial court limited testimony to 12 people. *Id.* at 64. Brookshire represented himself, taking the stand and actually asking questions of himself and then answering them. *Id.* Eventually, Hall received a judgment of \$7,000 against Brookshire based on the libelous letter authored by Brookshire. Brookshire appealed, challenging every aspect of the trial court proceedings, including the closing argument of Hall’s

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<sup>20</sup>“Reason in Common Sense,” *The Life of Reason* (1905).

<sup>21</sup>*The Tempest*, Act II, Scene 1.

<sup>22</sup>*Mending Wall* (1915).

attorney. Brookshire complained that opposing counsel's argument was "inflammatory, prejudicial, unethical, and untrue.

With a touch of irony—perhaps sarcasm—Court Commissioner John J. Wolfe, writing for the three-member panel of the Missouri Court of Appeals, referred to Hall's attorney as "learned counsel" and then recited the argument that so incensed Brookshire.

You may remember when Christ was preaching the gospel, in the Holy Roman Empire, that Julius Caesar was Emperor of Rome. As Christ was making his way toward Rome, the Mennonites and the Philistines stopped him in the road and they sought to entrap him. They asked Christ: "Shall we continue to pay tribute unto Caesar?" And you will remember, in the Book of St. Matthew it is written that Christ said: "Render ye unto Caesar the things that are Caesar's and unto God the things that are God's."

*Id.* at 66-67. Brookshire might have a point about "untrue." Judge Wolfe dryly observed:

The Holy Roman Empire did not come into existence until about 800 years after Christ. Julius Caesar, who was never Emperor of Rome, was dead before Christ was born. Christ was never on His way to Rome, and the Philistines had disappeared from Palestine before the birth of Christ. The Mennonites are a devout Protestant sect that arose in the Sixteenth Century A.D. This phrase is noteworthy only because of the ease with which the speaker crowded into one short paragraph such an abundance of misinformation. It is not, however, even pendulously attached to the argument following, which deals with taking from Brookshire and rendering unto Hall.

*Id.* at 67. The judgment of the trial court was affirmed, notwithstanding the curious history lesson.

### QUOTABLE . . .

Anyone who travels on the interstate system in northern states understands the force of the dictum that on the interstate highways in those states there are only two seasons: winter and construction.

Judge Richard A. Posner, *United Rentals Highway Technologies, Inc. v. Indiana Constructors, Inc. et al.*, 518 F.3d 526, 527 (7<sup>th</sup> Cir. 2008).

## UPDATES

### *STRIP SEARCHES*

In “Strip Searches,” **Quarterly Report** October-December: 2007 (Updates), the Arizona dispute involving a 13-year-old eighth-grade student (Savana Redding) and her school district (Safford Unified School District #1) was reported. That 2-1 decision by a three-member panel of the U.S. Ninth Circuit Court of Appeals has now been reviewed *en banc* by the full members of the 9<sup>th</sup> Circuit. The *en banc* decision is discussed *infra*.

Any search of a student in a public school will require resort to Supreme Court precedent. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733 (1985), is the seminal U.S. Supreme Court decision regarding the constitutional limits on searches of students, especially within the public school context. *T.L.O.* established a two-fold inquiry for searches of students by school personnel where there is a reasonable suspicion to believe that a law or school rule has been broken.

1. The search must be “justified at its inception” (a law or school rule is being broken or there is a reasonable basis to believe such will occur); and
2. The search must be “reasonably related in scope to the circumstances which justified the interference in the first place.”

“[S]uch a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *T.L.O.*, 469 U.S. at 342, 105 S. Ct. at 743.

*T.L.O.*, however, did not involve so-called “strip searches” of students.<sup>23</sup> Prior to *T.L.O.*, the U.S. Seventh Circuit Court of Appeals did have the opportunity to address the constitutionality of such a seemingly invasive search. In *Doe v. Renfrow*, 631 F.2d 91 (7<sup>th</sup> Cir. 1980), *reh. den.* 635 F.2d 582 (1980), *cert. den.* 451 U.S. 1022, 101 S. Ct. 3015 (1982), the 7<sup>th</sup> Circuit addressed a suspicionless “strip search” of students in search for contraband at an Indiana public school:

It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of school officials in permitting such a nude search was not only unlawful but outrageous under “settled indisputable principles of law.”

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<sup>23</sup>A “strip search” of students typically involves the students being separated by gender and marshaled into an area of privacy where they are required individually to partially disrobe and pull their clothes away from their person, all in the presence of school personnel of the same gender.

*Doe v. Renfrow*, 631 F.2d at 92-93, quoting *Wood v. Strickland*, 420 U.S. 308, 321, 95 S. Ct. 992, 1000 (1975).

Indiana courts have followed the *Renfrow* and *T.L.O.* holdings, generally finding disfavor with such procedures except where there are exigent circumstances that would warrant such invasive procedures.<sup>24</sup> In *Oliver v. McClung*, 919 F.Supp. 1206 (N.D. Ind. 1995), the Federal district court found the public school violated the constitutional rights of middle school students when a “strip search” was performed on seventh-grade female students in search of missing money (\$4.50). The court noted there was no imminent threat of harm from weapons or drugs that would justify such a search.

*Higginbottom v. Kiethly*, 103 F.Supp.2d 1075 (S.D. Ind. 2000), began when \$38.00 turned up missing from an unattended snack cart, although this is the only fact the parties agreed to. According to the court, the sixth-grade teacher, a male, singled out four (4) sixth-grade boys as suspects and had them disrobe down to their underwear in the boys’ bathroom. After searching their clothing to no avail, the teacher had them pull out their underwear where he visually inspected their genitalia and buttocks to see whether the money had been hidden there. While this “strip search” was going on, the \$38.00 was discovered in the possession of another student from another class. The court granted in part and denied in part the school district’s and teacher’s Motion for Summary Judgment for claims arising out of a “strip search.” In denying the summary judgment motion, the court noted that “a reasonable jury could find that [the teacher] acted willfully or callously in so conducting that search.” 103 F.Supp.2d at 1090.

The most recent dispute involves yet another 13-year-old middle school student. In the original go-around at the 9<sup>th</sup> Circuit Court of Appeals, *Redding v. Safford Unified School District #1, et al.*, 504 F.3d 828 (9<sup>th</sup> Cir. 2007), a divided (2-1) panel found that a strip search of an eighth-grade girl in search of prescription pills was not unreasonable.

Savana Redding, an honor student with no history of discipline problems, first drew the attention of the middle-school teachers during a dance in August to mark the beginning of the school year.<sup>25</sup> A small group of students was engaged in “unusually rowdy behavior.” Redding, who was then thirteen years old, was a member of this group, along with her friend Marissa. There

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<sup>24</sup>Circumstances that have warranted such invasive searches have included safety concerns, including reasonable suspicion of drug possession. These circumstances are often affected by the known disciplinary history of the student or the reliability of the source of information. See, e.g., *Cornfield v. Consolidated High School District No. 230*, 991 F.2d 1316 (7<sup>th</sup> Cir. 1993), where a 16-year-old student with a significant disciplinary and behavioral history was suspected of “crotching” drugs. Justice John Paul Stevens, in *T.L.O.* (concurring in part and dissenting in part), also wrote that “to the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent and serious harm.” *T.L.O.*, 469 U.S. at 383, 105 S. Ct. 764, n. 25.

<sup>25</sup>The facts are drawn from the original panel decision and the *en banc* decision released July 11, 2008.

was also a smell of alcohol emanating from this group. Later, staff members found a bottle of alcohol and package of cigarettes in the girls' restroom. No one was disciplined.

About six weeks later, another student (Jordan) and his mother spoke with the principal and assistant principal. The mother reported that Jordan had become violent with her a few nights before and had become sick to his stomach. Jordan claimed that he had taken some pills provided to him by a classmate. He also informed the administrators that certain students were bringing drugs and weapons to school. He provided specific information regarding several students, including Redding. He stated that Redding held a party prior to the August dance at which alcohol was served. He did not implicate Redding in any distribution of drugs at school. 504 F.3d. at 829-30.

A week later, Jordan met with the assistant principal. During this meeting, Jordan handed the assistant principal a white pill, adding that Marissa gave it to him. He also reported that a group of students planned to take pills at lunch. Jordan did not name Redding as an expected participant. The assistant principal took the pill to the school nurse, who identified it as "Ibuprofen 400 mg," a pill available only by prescription. *Id.* at 830.

The assistant principal asked Marissa to leave her class and accompany him to the office. He noticed a black planner on the desk next to Marissa's desk and asked her if it belonged to her. She denied it was hers. The assistant principal gave the planner to the classroom teacher. The teacher later discovered the planner held knives, lighters, a cigarette, and a permanent marker. The teacher informed the assistant principal of this discovery.

The assistant principal, with his administrative assistant (a female) observing, asked Marissa to turn out her pockets and open her wallet. This search uncovered a blue pill, several white pills, and a razor blade. The blue pill was later identified as an over-the-counter medication. The assistant principal asked Marissa where the blue pill came from and she replied, "I guess it slipped in when she gave me the IBU 400s." When asked who "she" was, Marissa identified Savana Redding. Marissa again denied any ownership of the black planner. Thereafter, the administrative assistant took Marissa into the nurse's office and closed the door, where a strip search was conducted. No other contraband was discovered. *Id.*

The assistant principal, meanwhile, retrieved Redding from class and asked her to accompany him to his office. Redding acknowledged the black planner belonged to her but claimed she had loaned it to Marissa so she could "hide some things from her parents." Redding denied any knowledge regarding the contents of the planner. Redding also denied any knowledge regarding the pills uncovered during the search of Marissa and denied passing out pills to her classmates. Redding's backpack was searched, but no contraband was discovered. The administrative assistant took Redding into the nurse's office and conducted a strip search. Redding was asked to remove her jacket, shoes, and socks; remove her pants and shirt; pull out her bra to the side and shake it, which exposed her breasts; and pull out her underwear at the crotch and shake it, which exposed her pelvic area. This strip search was more invasive than the one performed on Marissa. The search was fruitless. At no point during this strip search did the administrative assistant or the school nurse touch Redding. *Id.* at 831.

Redding sued the school district, the assistant principal, the administrative assistant, and the school nurse, alleging that the strip search violated her Fourth Amendment rights. The Federal district court granted the defendants summary judgment, finding the search was justified at its inception and permissible in its scope. Redding appealed. A divided three-member panel (2-1) affirmed the district court's decision. The following were pertinent findings:

1. The governmental interest at stake (barring unauthorized use of prescription drugs at school) is considerable, particularly given the "inherent risks posed by prescription drugs." *Id.* at 835. Prior to any strip search, the assistant principal had verified that the pill produced by Jordan was a prescription drug. Jordan's mother earlier reported violent behavior and sickness on Jordan's part, the result of abuse of prescription drugs.
2. The size of the contraband is also a factor. School officials were searching Redding for pills, which are small and easily secreted. Redding's person was searched only after contraband was not discovered in her backpack. It was also observed that Redding was wearing clothes that did not have pockets. It was not unreasonable, under these circumstances, to have Redding remove her clothing so that a search could be conducted.
3. The search was administered in a reasonable manner. The two employees who conducted the search were both of the same gender as Redding, and the search was conducted in the privacy of the school nurse's office with the door securely locked. Redding was not physically touched by either the administrative assistant or the school nurse. She was not asked to remove her bra or her underwear. "Under those facts, we cannot say that Defendants' search of Redding's person exceeded the permissible scope prescribed by the Supreme Court in *T.L.O.*"

*Id.* at 835-36.

Redding sought review by the U.S. Supreme Court. However, on January 31, 2008, the 9<sup>th</sup> Circuit ordered that the case be reheard *en banc*, adding that the decision of the three-judge panel would not be cited as precedent by or to any court in the 9<sup>th</sup> Circuit. *Redding v. Safford Unified School District #1*, 514 F.3d 1383. The U.S. Supreme Court, on March 5, 2008, in light of the 9<sup>th</sup> Circuit's decision to rehear the case, dismissed Redding's petition for writ of certiorari. *Redding v. Safford Unified School District #1*, 128 S. Ct. 1497 (2008).

On July 11, 2008, the 9<sup>th</sup> Circuit released its lengthy (75 pages) decision, with six judges finding that the search of Redding was not justified at its inception and was not reasonable in its scope. Two judges dissented, agreeing the search violated the Fourth Amendment, but believing the school personnel were entitled to qualified immunity. Two other judges dissented. The net effect: The panel's decision was reversed, except as to the finding that the administrative assistant and the school nurse were entitled to qualified immunity. *Redding v. Safford Unified School District #1*, 531 F.3d 1071 (9<sup>th</sup> Cir. 2008).

Because the school officials are asserting that they are entitled to qualified immunity, the two-step inquiry under *Saucier v. Katz*, 533 U.S. 194, 200, 121 S. Ct. 2151 (2001) will be applied: (1)

Do the facts demonstrate a public official's actions violated a constitutional right? and (2) If so, was the constitutional right violated "clearly established" at the time?<sup>26</sup> 531 F.3d at 1078.

### **Constitutionality of the Strip Search**

The majority reviewed the pertinent holdings from *T.L.O.* Applying *T.L.O.* to Redding's case, the majority found the search to be unconstitutional.

Nowhere does the *T.L.O.* Court tell us to accord school officials' judgment unblinking deference. Nor does *T.L.O.* provide blanket approval of strip searches of thirteen year olds remotely rumored to have Advil merely because of a generalized drug problem. Rather, the Court made it clear that while it did not require school officials to apply a probable cause standard to a purse search, it plainly required them to act "according to the dictates of reason and common sense." *T.L.O.*, 469 U.S. at 343.... [T]he public school officials who strip-searched Savana acted contrary to all reason and common sense as they trampled over her legitimate and substantial interests in privacy and security of her person.

*Id.* at 1080. The majority relied upon the 7<sup>th</sup> Circuit's decision in *Cornfield*. "[A]s the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness. What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search." *Id.* at 8436, quoting *Cornfield*, 991 F.2d at 1321 (7<sup>th</sup> Cir. 1993). In this case, there were two related searches of Savana. The first one (her backpack and her pockets) was likely justified at its inception and is not implicated in this present dispute. The second search was the strip search. "[W]hile reasonable suspicion may very well have justified the initial search of Savana's backpack and the emptying of her pockets, it was unreasonable to proceed from this first search to a strip search." *Id.* at 1081. The first search did not produce any contraband. While the first search may have been justified at its inception, the second search was not justified at its inception. *Id.* at 1082.

First, there was no physical evidence obtained by the first search. The first search was based on the "self-serving statement" of Marissa in an attempt to "shift[] the culpability." However, Marissa's statement was insufficient for justifying a "highly invasive strip search of a student who bore no other connection to the pills in question." *Id.* Not all informants' tips are "equal in their reliability." Marissa had been caught in possession of contraband. Her reliability and veracity are certainly questionable.

Our concerns are heightened when the informant is a frightened eighth grader caught red-handed by [an assistant] principal. This is particularly so when the

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<sup>26</sup>The 9<sup>th</sup> Circuit majority noted that *Saucier*'s two-step inquiry process has been much criticized. The U.S. Supreme Court has granted certiorari in *Pearson v. Callahan*, 128 S. Ct. 1702 (March 24, 2008), where the question is whether *Saucier* should be overruled.



student implicates another who has not previously been tied to the contraband and, more generally, has no disciplinary history whatsoever at the school. More succinctly, the self-serving statement of a cornered teenager facing significant punishment does not meet the heavy burden necessary to justify a search accurately described by the Seventh Circuit as “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, [and] embarrassing.” *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7<sup>th</sup> Cir. 1983).

*Id.* at 1083. Because of the inherent unreliability of Marissa’s statements, the assistant principal should have conducted an additional investigation. It should have been noted that Marissa did not state Savana currently possessed any pills or that she was secreting them on her person. The assistant principal could have talked to Savana’s teachers and her parents or questioned other students. There was nothing “to bolster the tip’s reliability to a degree sufficient to justify a further and more intrusive search.” *Id.* 8440. The fact that Savana loaned Marissa her planner or that alcohol may have been served at her house six weeks earlier would not have “provided reasonable grounds to believe that a strip search of Savana would reveal ibuprofen.” *Id.* at 8440-41. There was no reasonable suspicion of imminent harm that would have justified such an invasive search. *Id.* at 8442, distinguishing this dispute from the facts in *Cornfield*. The school district could not justify the strip search on the unsubstantiated tip from Marissa. There was also no logical connection between the alleged alcohol use six weeks earlier or Marissa’s hidden contraband in the planner and the subsequent strip-search of Savana to find hidden pills. “For these reasons, we hold that the strip search of Savana was unjustified at its inception.” *Id.* at 1085.

### **Reasonable In Scope**

As noted in *T.L.O.*, the scope of a search is permissible only if “the measures adopted are reasonably related to the objectives of the search and *not excessively intrusive in light of the age and sex of the student and the nature of the infraction.*” *Id.*, quoting *T.L.O.*, 469 U.S. at 342 (emphasis added by 9<sup>th</sup> Circuit).

We conclude the strip search was not reasonably related to the search for ibuprofen, as the most logical places where the pills might have been found had already been searched to no avail, and no information pointed to the conclusion that the pills were hidden under her panties or bra (or that Savana’s classmates would be willing to ingest pills previously stored in her underwear). Common sense informs us that directing a thirteen-year-old girl to remove her clothes, partially revealing her breasts and pelvic area, for allegedly possessing ibuprofen, an infraction that poses an imminent danger to no one, and which could be handled by keeping her in the principal’s office until a parent arrived or simply sending her home, was excessively intrusive.

*Id.* The effect of the strip-search is not ameliorated by the fact the search was conducted by school personnel of the same gender in a secure location. “That Savana’s search took place in a nurse’s office in front of two women does not remove the sting of the procedure.” *Id.* at 1086.

The majority observed that “[t]he overzealousness of school administrators in efforts to protect students has the tragic impact of traumatizing those they claim to serve.” *Id.* The majority rejected the school district’s attempt to “lump together these run-of-the-mill anti-inflammatory pills with the evocative term ‘prescription drugs,’ in a knowing effort to shield an imprudent strip search of a young girl behind a larger war against drugs.” *Id.*

Nothing in the record provides any evidence that the school officials were concerned in this case about controlled substances violative of state or federal law. No legal decision cited to us or that we could find permitted a strip search to discover substances regularly available over the counter at any convenience store throughout the United States.<sup>27</sup>

*Id.* at 1086-87.

### **Was This Right “Clearly Established” at the Time?**

The strip search took place in 2003. *T.L.O.* was decided in 1985, providing the legal framework that should have put “school officials on notice that a strip search was not a reasonable measure to use on a thirteen-year-old girl accused by an unreliable student informant of having ibuprofen in violation of school rules.” *Id.* at 1088. Common sense and reason “supplement the federal reporters.” Some “safeguards on government intrusion remain self-evident and do not require a case on point to prevent government officials from hiding behind the cloak of qualified immunity.” *Id.*, citing *Brannum v. Overton County School Board*, 516 F.3d 489 (6<sup>th</sup> Cir. 2008), addressing the constitutionality (or lack thereof) of placing video cameras in a middle school locker room.

We hold that Savana’s rights were clearly established at the time that Assistant Principal Wilson, in his official capacity, initiated and directed the strip search. The record before us leaves no doubt that it would have been clear to a reasonable school official in Wilson’s position that the strip search violated Savana’s constitutional rights, and we therefore reverse summary judgment as to him and the school district.

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<sup>27</sup>The majority added that had Savana actually been accused of a federal crime, “she would have been entitled to more legal protections [than] she received here.” *Id.* at 1087, citing to 18 U.S.C. § 5033, requiring that when a juvenile is taken into custody for an alleged drug offense, the arresting officer is required to notify the Attorney General and the juvenile’s parent, guardian, or custodian.

*Id.* at 1089. However, the administrative assistant and the school nurse were not independent decision-makers and were acting pursuant to the assistant principal's directions. Accordingly, they were entitled to summary judgment. *Id.*

### ***PLEDGE OF ALLEGIANCE***

Challenges to State laws regarding the Pledge of Allegiance continue.<sup>28</sup> The latest one is *Frazier v. Winn*, 535 F.3d 1279 (11<sup>th</sup> Cir. 2008). This dispute involved Florida's Pledge statute, which applies to all K-12 students. *Florida Statute § 1003.44(1)* reads in relevant part:

The pledge of allegiance to the flag...shall be rendered by students.... The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge. When the pledge is given, civilians must show full respect to the flag by standing at attention, men removing the headdress, except when such headdress is worn for religious purposes....<sup>29</sup>

Frazier, a high school student and a minor, challenged the Pledge Statute, asserting that it was facially invalid because it required a student to obtain parental permission before being excused from reciting the Pledge and the statute required one to stand during its recitation even if excused. He sued the Florida Department of Education and the State Board of Education. The State defendants moved to dismiss the complaint, arguing that the statute reflects the fundamental right of parents to control the upbringing of their minor children. The State also argued that the reference to "civilians" does not refer to students who have been excused from recitation of the Pledge. The Federal district court denied the State's Motion to Dismiss, finding instead that the parental-permission requirement "robs the student of the right to make an independent decision" and further finding the requirement to stand would apply to an excused

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<sup>28</sup>Please consult the Cumulative Index for past issues of the **Quarterly Report** where legal wrangling over the Pledge of Allegiance has been reported.

<sup>29</sup>Indiana's statute, by contrast, reads as follows:  
**IC § 20-30-5-0.5 Display of United States flag; Pledge of Allegiance**  
Sec. 0.5. (a) The United States flag shall be displayed in each classroom of every school in a school corporation.  
(b) The governing body of each school corporation shall provide a daily opportunity for students of the school corporation to voluntarily recite the Pledge of Allegiance in each classroom or on school grounds. A student is exempt from participation in the Pledge of Allegiance and may not be required to participate in the Pledge of Allegiance if:  
(1) the student chooses to not participate; or  
(2) the student's parent chooses to have the student not participate.

student. The district court granted Frazier's Motion for Judgment on the Pleadings, determining the statute to be facially unconstitutional. The State appealed.

The three-judge panel of the 11<sup>th</sup> Circuit Court of Appeals affirmed in part and reversed in part the district court's judgment. The panel agreed with Frazier that the statute does, indeed, require all students to stand at attention for recitation of the Pledge, even if excused from participation. However, this part of the statute can be severed from the rest, "leaving the statute otherwise enforceable."

Students have a constitutional right to remain seated during the Pledge. See *Holloman v. Harland*, 370 F.3d 1252 (11<sup>th</sup> Cir. 2004). Although the State's argument is plausible that the standing requirement may have been intended to apply only to non-exempt students, the construction of the language as it is written makes such an interpretation improbable.

The Pledge Statute expressly requires "civilians" to stand during the Pledge. No limiting terms apply to "civilians"; it seems easily to cover all students. And no mention is made of the parental-written-request provision that applies to the requirement to recite the Pledge.

A typical interpretation of "civilians" means those people who are not in uniform. A student is a "civilian." This part of the Pledge Statute is unconstitutional. However, an invalid part of a statute can be severed if to do so is to leave what is left "fully operative as a law."

Because nothing indicates that the Florida legislature would have declined to enact the Pledge Statute absent the provision which we see as unconstitutional, we conclude that the invalid "standing at attention" provision may be severed. In this way, the statute can survive the "standing at attention" challenge.

The 11<sup>th</sup> Circuit panel disagreed, however, with the district court's determination that the parental-permission requirement as applied to a minor child was unconstitutional. The panel viewed the statute as a parental-rights statute. "[T]he statute ultimately leaves it to the parent whether a schoolchild will pledge or not."

The rights of students and the rights of parents—two different sets of persons whose opinions can often clash—are the subject of a legislative balance in the statute before us. The State, in restricting the student's freedom of speech, advances the protection of the constitutional rights of parents: an interest which the State may lawfully protect.

While the 11<sup>th</sup> Circuit accepted that government ordinarily cannot compel students to participate in the Pledge, "we also recognize that a parent's right to interfere with the wishes of his child is stronger than a public school official's right to interfere on behalf of the school's own interest.... And this Court and others have routinely acknowledged parents as having the principal role in guiding how their children will be educated on civic values."

We conclude that the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students' freedom of speech.

The 11<sup>th</sup> Circuit did note that it was addressing the constitutionality of the statute and was not dissecting it with respect to an identifiable group or subgroup. "We stress that we decide and hint at nothing about the Pledge Statute's constitutionality as applied to a specific student or a specific division of students."

### ***MOMENT OF SILENCE***

In a 1985 decision, the U.S. Supreme Court invalidated on Establishment Clause basis an Alabama statute authorizing a one-minute period silence in all the public schools "for meditation or voluntary prayer." *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479 (1985). In a concurring opinion, then-Justice Sandra Day O'Connor observed that a moment-of-silence law that did not have the primary purpose of promoting prayer might pass constitutional muster. 472 U.S. at 74-76, 105 S. Ct. at 2499-2500. Justice O'Connor's opinion has been put to the test ever since.<sup>30</sup>

In *Bown v. Gwinnett Co. Sch. Dist.*, 895 F.Supp. 1564 (1995), *affirmed*, 112 F.3d 1464 (11<sup>th</sup> Cir. 1997), Georgia's "Moment of Quiet Reflection in Schools Act" satisfied constitutional requirements. The 1994 Georgia law provided for a brief period of quiet reflection for not more than 60 seconds at the beginning of every school day. Prayer was not mentioned, and the Act did not penalize anyone who elected not to take part in the period of quiet reflection. The constitutionality of the Act was not jeopardized because of statements by some legislators who voted for the law as a means of restoring prayer to the public schools.<sup>31</sup>

Virginia's dispute received considerable attention. In *Brown v. Gilmore*, 258 F.3d 265 (4<sup>th</sup> Cir. 2001), *cert. den.*, 534 U.S. 996, 122 S. Ct. 465 (2001), the Virginia General Assembly amended a 1976 law that authorized—but did not require—local school boards to establish a minute of silence in their classrooms for the expressly stated purpose of allowing students to meditate, pray, or engage in other silent activity. The 2000 legislative amendments *required* every school district to provide a minute of silence in its classrooms. The amended law read in relevant part:

In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from religious observation on school grounds, the school board of each school

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<sup>30</sup>See "A Moment of Silence," **Quarterly Report**, July-September: 2001.

<sup>31</sup>In Goals 2000: Educate America Act, 20 U.S.C. § 6061 (1994), states and local school systems are prohibited from adopting "policies that prevent voluntary prayer and meditation in public schools." The law is "still on the books."

division shall establish the daily observance of one minute of silence in each classroom of the division.

During such one-minute period silence, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

*Va. Code Ann.* § 22.1-203 (2000), 258 F.3d at 271, *n.* 1. Legislative debate was passionate on all sides. The Federal district court found the amended law satisfied all three prongs of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971), and the U.S. Fourth Circuit Court of Appeals affirmed, noting that the First Amendment was designed to protect religious liberty. “[T]he Religion Clauses [of the First Amendment] must not be interpreted with a view that religion be suppressed in the public arenas in favor of secularism.” 258 F.3d at 274. The statute is facially neutral “between religious and nonreligious modes of introspection and other silent activity.” *Id.* at 277. Any involvement with government and religion is “negligible, left only to informing students that one of the permissible options during the moment of silence is prayer.” *Id.* at 278. “[I]n establishing a minute of silence, during which students may choose to pray or meditate in a silent and nonthreatening manner, Virginia has introduced at most a minor and nonintrusive accommodation of religion that does not establish religion.”

Other States amended existing laws or created new ones modeled after Virginia’s. Indiana was one such State.<sup>32</sup> Texas’ “Moment of Silence” statute has also been challenged. The Texas law, effective September 1, 2003, requires the observance of one-minute of silence at each school in a public school district, to be observed immediately following the pledges of allegiance to the United States and Texas flags. During this one-minute period, a student can elect to “reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student.” Teachers or other school personnel are to ensure students remain silent and do

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<sup>32</sup>**IC § 20-30-5-4.5 Moment of Silence**

Sec. 4.5. (a) In order that:

- (1) the right of each student to the free exercise of religion is guaranteed within the schools; and
- (2) the freedom of each student is subject to the least possible coercion from the state either to engage in or to refrain from religious observation on school grounds;

the governing body of each school corporation shall establish the daily observance of a moment of silence in each classroom or on school grounds.

(b) During the moment of silence required by subsection (a), the teacher responsible for a classroom shall ensure that all students remain seated or standing and silent and make no distracting display so that each student may, in the exercise of the student's individual choice, meditate, pray, or engage in any other silent activity that does not interfere with, distract, or impede another student in the exercise of the student's individual choice.

*As added by P.L.78-2005, SEC.6.*

not interfere with or distract other students.<sup>33</sup> A Federal district court judge recently determined that the addition of “pray” to the statute as well as the amendments making the Moment of Silence mandatory rather than permissive did not alter the statute such that it ran afoul of *Lemon*. See *Croft v. Governor of Texas, et al.*, 530 F.Supp.2d 825 (N.D. Tex. 2008).

### **The Latest Controversy**

All of which brings us to Illinois and *Sherman v. Township High School District 214*, 2008 U.S. Dist. LEXIS 43261 (N.D. Ill., June 2, 2008), a class-action lawsuit that also involves the Illinois State Superintendent of Education.

Illinois has had a law since 1969 that provided for a “period of silence” to be observed daily in the public schools. The original statute conferred discretion upon a teacher as to whether a “brief period of silence” would be observed “at the opening of every school day.” If such an observance occurred, the period could not be “conducted as a religious exercise but shall be an opportunity for silent prayer or for silent reflection on the anticipated activities of the day.” 2008 U.S. Dist. LEXIS 43261 at \*3-4.

The statute was amended in 1990 and again in 2003. Its current name is “The Silent Reflection and Student Prayer Act,” and reads in relevant part:

Sec. 5. Student prayer. In order that the right of every student to the free exercise of religion is guaranteed within the public schools and that each student has the right to not be subject to pressure from the State either to engage in or to refrain from religious observation on public school grounds, students in the public schools may voluntarily engage in individually initiated, non-disruptive prayer that, consistent with the Free Exercise and Establishment Clauses of the United States and Illinois Constitutions, is not sponsored, promoted or endorsed in any manner by the school or any school employee.

*Id.* at \*4, citing 105 *ILCS* 20/5. The Illinois legislature again amended the law in October of 2007, making this period of silence mandatory. The statute now reads: “In each public school classroom the teacher *shall* observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day.” *Id.* at \*4-5 (emphasis added by the court).

Dawn S. Sherman, a student, challenged the observance of this law by her school district and its enforcement by the State Superintendent of Education, alleging violation of the First Amendment’s Establishment Clause and seeking a preliminary injunction to prevent its implementation. *Id.* at \*2.

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<sup>33</sup>*Tex. Educ. Code* § 25.082(d).

The Federal district court noted that a preliminary injunction would be warranted where the plaintiff can demonstrate some likelihood of success on the merits, an inadequate remedy at law, and irreparable harm should the injunction be denied. Even where these elements are met, the court must balance the harm to the non-movant (the school district) should the injunction be granted against the irreparable harm to the moving party (the student) should the relief be denied. The court must also consider the public interest when determining whether to issue a preliminary injunction. *Id.* at \*5-6 (citation omitted).

The district court in this case found that the plaintiff did satisfy the necessary elements to warrant the issuance of a preliminary injunction. She successfully argued the statute is void because it is unconstitutionally vague. A law is void for vagueness, the court wrote, where the “terms are so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application[.]” *Id.* at \*6, quoting *Roberts v. U. S. Jaycees*, 468 U.S. 609, 629, 104 S. Ct. 3244 (1984) (internal punctuation omitted). “A vague law is especially troublesome when, as in the instant case, the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights.” *Id.* (citation and internal punctuation omitted).

Sherman established a likelihood she would prevail on her claim that the Illinois law is unconstitutionally vague. The court listed the law’s purported deficiencies:

- There is no indication as to how the period of silence will be implemented, particularly whether students will be advised of its purpose.
- There is no guidance as to what time of the day the period of silence should be observed (the “opening of every school day” is subject to various interpretations).
- There is no time limit for this period of silence.
- There is no indication whether students would be permitted to move about the room during this period of silence or whether they must stand at or sit in their seats.
- There are no indications regarding what penalties, if any, would be meted out to students who do not observe the period of silence, to teachers who decline to ensure its observance, or to school districts that decline to implement the law.
- There are no indications whether some student-specific religious practices would be proscribed by a strict reading and application of this law, such as a Muslim student kneeling on a prayer rug, a student looking at a Bible, or a student chanting a psalm.

*Id.* at \*6–10. “At essentially every level, the statute requires a ‘guess at its meaning,’ and it provides room for differing applications.” *Id.* at \*8..

### **Establishment and Free Exercise Concerns**

The lack of guidance in the statute could result in differing methods of implementation. In addition, a precise reading of the statute requires students “to *choose* between prayer and thinking about ‘the anticipated activities of the day.’ At a basic level, the court notes that any pupil choosing to do anything but pray or think about that day’s activities—the previous night’s Bears game, for example—would be in violation of the statute.” *Id.* at \*9-10 (emphasis original).




The law also emphasizes prayer as the first choice. While a Moment of Silence is not unconstitutional *per se*, the legislature's actions of adding "prayer" to the title and the text of an existing statute "convey[s] the message that children should use the moment of silence for prayer," which may violate the Establishment Clause. *Id.* at \*10, citing *Wallace v. Jaffree*, 472 U.S. at 73 (1985).

Lastly, the statute's proscriptions may actually inhibit the religious practices of some students. "Because of the statute's vagueness, the court is also concerned about possible violations of pupils' rights under the Free Exercise Clause[.]" *Id.* at \*11.

For these reasons, the court found that there was a strong likelihood the plaintiff would succeed on the merits of the suit. With no adequate remedy at law, only an injunction would prevent a violation of the students' First Amendment rights. Without the injunction, the students would suffer irreparable harm, a harm that greatly outweighs any harm to the Illinois public schools. The issuance of the preliminary injunction also furthers the public interest in the protection of First Amendment rights. *Id.* at \*11-12.

The State Superintendent moved to be dismissed as a defendant in this matter because the statute at issue did not provide his office with any enforcement powers. The court read the rather broad (and generally stated) authority conferred upon the Illinois State Board of Education (of which the State Superintendent is the chief executive officer) as conferring upon the State Superintendent "the authority to compel school districts to comply with state laws such as the statute in question." *Id.* at \*12. The State Superintendent might have the authority to withhold funds from a public school district failing to comply with the statute. As a consequence, the State Superintendent, the court reasoned, "is the responsible state officer for enforcing the period of silence statute, and is therefore a proper party defendant in this case." *Id.* at \*12-13.

Date: December 1, 2008

  
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